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Supreme Court, U.S.
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NO. 02-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

LEONARD A. PELULLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED

Petitioner was convicted of federal wire fraud charges as well as a RICO violation arising from the fraud charges. Subsequent to his conviction, he discovered *Brady* evidence suppressed by the government that undermined the credibility of the central government witness. The district court, however, denied a timely filed motion to set aside his conviction and sentence under 28 U.S.C. § 2255 and refused, without explanation, to grant a certificate of appealability (COA). The court of appeals also refused to grant a COA. Accordingly, the questions presented are:

1. Whether a court of appeals can, consistent with 28 U.S.C. § 2253(c)(2) and this Court's decision in *Slack v. McDaniel*, require the petitioner to demonstrate at the COA stage that he is entitled to relief rather than demonstrate that jurists of reason would find the issue raised in the COA petition debatable?

2. Whether a court of appeals can deny a COA on the ground that inclusion of *Brady* evidence during the petitioner's trial would not have changed the outcome, a standard this Court found improper in *Kyles v. Whitley*?

3. Whether a court of appeals can by local rule empower the district courts within its jurisdiction to deny a COA to one seeking relief under 28 U.S.C. § 2255 before an appeal is filed, a certificate requested, and without explanation, contrary to the mandate in Federal Rule of Appellate Procedure 22(b)(1) that when "an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a COA or state why a certificate should not issue," thereby denying the petitioner a substantive due process right?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Leonard A. Pelullo, respectfully petitions this Court for a writ of certiorari granting a COA to review the judgment of the United States District Court for the Eastern District of Pennsylvania denying him relief pursuant to 28 U.S.C. § 2255 from which both the district court and United States Court of Appeals for the Third Circuit refused to grant a COA.

OPINIONS BELOW

1. The order of the court of appeals denying Petitioner's request for a COA to review the district court's decision denying the motion to set aside his conviction and sentence (App. 1a) is unreported.

2. The district court's order of April 24, 2001 refusing to issue a COA (App. 18a) was appended to its decision of like date denying

Petitioner's § 2255 motion to vacate his conviction and sentence (App. 2a-18a). That decision is reported at 144 F. Supp. 2d 369 (E.D.Pa. 2001). Although F.R.App.P. 22(b)(1) requires a district judge upon the filing of a notice of appeal to "either issue a certificate of appealability or state why a certificate should not issue," none was provided in this case; hence, its omission from the Appendix.

3. During the decade preceding the decision denying his § 2255 motion, the United States Court of Appeals reversed Petitioner's conviction on three occasions. The decisions of the Third Circuit are reported as follows: *U.S. v. Pelullo,* 964 F.2d 193 (3d Cir.1992), *reh'g denied,* 14 F.3d 881 (3d Cir.1994); *U.S. v. Pelullo,* 14 F.3d 881 (3d Cir.1994) *reh'g and reh'g inbanc denied,* 14 F.3d 881 (3d Cir.1994)); *U.S. v. Pelullo,* 105 F.3d 117 (3d Cir.1997); *U.S. v. Pelullo,* 173 F.3d 131 (3d Cir.1999); *U.S. v. Pelullo,* 178 F.3d 196 (3d Cir.1999); *Pelullo v. U.S.,* 528 U.S. 824, 120 S.Ct. 72, 145 L.Ed.2d 62 (1999).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit issued its order on November 12, 2002 denying Petitioner a COA as to the district court's decision refusing to set aside his conviction and sentence pursuant to 28 U.S.C. § 2255. This Court has jurisdiction to grant Petitioner a COA as provided in 28 U.S.C. § 2253(c) and to review the rulings below on certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The constitutional and statutory provisions at issue are reproduced in the Appendix as provided in Supreme Court Rule 14.1(f) (App. 36-38a).

STATEMENT OF THE CASE

1. This is but one case against Petitioner that the government has brought against Petitioner in its tireless attempts to keep him

imprisoned on charges of racketeering and related acts. In three other cases, Petitioner has prevailed. In 1990, he was acquitted on federal charges in Cincinnati, Ohio; in 2000, the government dismissed a federal indictment against him with prejudice in Jacksonville, Florida after he unearthed overwhelming evidence of innocence; in 2002, he won a new trial in Newark, New Jersey after the same overwhelming evidence of innocence came to light.

In 1991, the government brought the instant case against Petitioner in Philadelphia, Pennsylvania. For twelve years, the government has attempted to keep Petitioner in prison for alleged acts of racketeering and related offenses. There have been four trials in this case, one hung jury, and three reversals by the Third Circuit. *See* p. 2, *supra* (*citing* reported decisions). The government has prevailed only by concealing evidence that disproves the meager evidence on which Petitioner's conviction stands. The district court refused to vacate Petitioner's conviction despite evidence within his § 2255 motion that squarely refutes the government's accusations.

2. In February 1991, a grand jury returned a multi-count indictment against Petitioner charging him with wire fraud and racketeering. App. 2a. The indictment averred that Petitioner had conducted three fraudulent schemes to divert corporate funds to his personal use. The alleged fraudulent diversions included a February 25, 1986 wire transfer of $114,000 from a corporate bank account of the Palm Beach Heights Development Corporation ("PBH") to a bank account in Philadelphia controlled by Pelullo. *Id.* The fraudulent wire transfer was charged as a wire fraud violation (Count 54) and a racketeering act ("RA 60") in the racketeering count (Count 55). *Id.*

The principal witness against Petitioner on this charge was Philip Leonetti, a former underboss of the Philadelphia Mafia, who testified as a cooperating witness pursuant to an agreement with prosecutors following his conviction on RICO charges and a 45-year sentence of imprisonment. App. 19a. Leonetti's agreement with the government included promises to seek reductions of this and another sentence and to sponsor him for the Federal Witness Program. In fact, Leonetti was already in witness protection and had received government payments at the time he testified in Petitioner's first trial.

3. The government's wire fraud theory was that the $114,000 had been wired from a Florida bank account to a corporation in Philadelphia, from where it was delivered to a loanshark, Anthony DiSalvo, to pay off a personal debt. App. 19a. Petitioner testified in the first trial that he repaid the debt from other sources, and that the $114,000 was used to pay an intercompany debt. App. 21a.

The government contended that Petitioner met with Nicodemo Scarfo, head of the Philadelphia Mafia, and Leonetti at Scarfo's residence in Florida to discuss repayment of the debt Petitioner owed to DiSalvo. App. 18a. Leonetti testified this meeting occurred after Christmas Day of 1985, but before a date in the early part of January 1986, when Scarfo and Leonetti returned to Philadelphia.

Petitioner was convicted in the first trial on 49 counts of wire fraud and on the RICO count and was sentenced to 24 years imprisonment. App. 19a. The Third Circuit reversed for a new trial because of the district court's error in admitting hearsay documents and summary evidence in support of the wire fraud charges. *United States v. Pelullo*, 964 F.2d 193, 198-206 (3d Cir. 1992) (*Pelullo I*). App. 18a. The court held, however, that the error was harmless as to Count 54 and affirmed the conviction on that count. *Id.*

4. Following his conviction in the second trial, Petitioner discovered a suppressed IRS memorandum detailing an interview in which Leonetti made inconsistent statements about his alleged meeting with Petitioner and DiSalvo. App. 18a;*see United States v. Pelullo*, 14 F.3d 881, 886 (3d Cir. 1994) (*Pelullo II*). Petitioner moved for a new trial on Count 54, asserting that the non-disclosure of the IRS memorandum violated *Brady v. Maryland*, 373 U.S. 83 (1963). App. 20a. The Third Circuit held that while the suppression of the IRS memorandum violated *Brady*, a new trial was not required on Count 54. *Pelullo II*, 14 F.3d at 887. The court reversed the remaining convictions because the district court erroneously permitted the government to argue (and erroneously instructed the jury) that Petitioner's conviction on Count 54 established RA 60 as a matter of law. *Id.*, 14 F.3d at 888-900; App. 20a. The court held that the "spillover effect" was sufficient to warrant a retrial on all of the wire fraud counts as well as the RICO count. *Id.*

5. Despite Petitioner's repeated requests for production of *Brady* material prior to his first and second trials, the government never disclosed evidence of its surveillance of Scarfo's residence. Prior to his third trial, Petitioner again sought disclosure of surveillance operations pertaining to Scarfo, Leonetti, or Petitioner to demonstrate that he had not met with Leonetti or Scarfo in December 1985 or January 1986. *See United States v. Pelullo*, 895 F. Supp. 718, 738 (E.D.Pa. 1995). The government refused to produce surveillance reports, and Assistant United States Attorney Cole stated to the court: "There is no Brady material with respect to any surveillance records." (9/28/94 Tr. 90-91). AUSA Cole agreed to "ascertain the exact extent" of the surveillance, acknowledging that Petitioner would be entitled to such reports "if it's *Brady* [material]." AUSA Cole thereafter provided Petitioner with a computer-generated summary of surveillance operations at Scarfo's residence on January 2, 4, 5 and 21-31, 1986.

At a subsequent hearing, Petitioner's counsel noted the absence of any records prior to January 2, 1986 and requested clarification as to the date of the alleged meeting with Leonetti. AUSA Cole responded that "the meeting took place sometime after Christmas and in the beginning of January," but he could not "pinpoint it any more than that." (10/3/94 Tr. 4). AUSA Cole again agreed to verify the extent of the surveillance operations, stating: "I know what my obligations are under *Brady*. I do not have to fill in all the gaps unless it rises to a *Brady* level and it does not rise to a *Brady* level." *Id.* at 6.

On October 10, 1994, AUSA Cole provided Petitioner with a letter setting forth additional information concerning surveillance operations which reflects that Scarfo and Leonetti would have been in Florida between *December 28, 1995 and January 8, 1996*. The letter confirmed that surveillance operations were conducted on Scarfo's residence on December 27, 28, and 29, 1995 but did not explain the gaps in the logs. At a subsequent hearing, AUSA Cole represented that "they have all the surveillances that were conducted for the period they asked for, . . .if it doesn't show there was a surveillance then there wasn't a surveillance." (10/13/94 Tr. 140).

6. Prior to the commencement of the third trial, the government disclosed three previously-suppressed items: (1) rough notes of an

interview of Petitioner on June 14, 1990 by FBI agent Wolverton; (2) a memorandum and rough notes of an interview of Leonetti by IRS agent Kurtz; and (3) the FBI's logs of its surveillance operation on Scarfo's residence. App. 20a-21a, 25a-26a. The first item, agent Wolverton's rough notes, reflected notations consistent with Petitioner's testimony that the $114,000 had been used to repay an intercompany debt. *Id.* The second item, the rough notes of IRS agent Kurtz's interview of Leonetti during an investigation relating to the DiSalvo loan, contains a notation "Summer 1986." *Id.* Since the government alleged the wire transfer occurred on February 25, 1996, Kurtz's notation of "Summer 1986" was favorable evidence to Petitioner. The third item comprised reports of FBI surveillance on Scarfo's Florida residence during twelve days in January 1986 which do not reflect that Petitioner was seen in or about the residence. *Id.* Petitioner was able to use the previously-undisclosed evidence in his third trial, which ended in a mistrial after the jury deadlocked. *Id.*

7. During Petitioner's fourth trial, the only significant difference in the government's case was its introduction of Petitioner's testimony in the first trial. App. 21a. Petitioner testified that he had been to Scarfo's residence to help Sam LaRusso, a former employee of Petitioner's father, perform construction work. (7/1/91 Tr. 200). When Petitioner was asked whether he had ever spoken with either Leonetti or Scarfo about the DiSalvo loan, he flatly responded: "Never." *Id.* at 198-99. In Petitioner's subsequent appeal, the Third Circuit characterized Petitioner's prior testimony as "in essence, . . .the government's case against [Petitioner] in his fourth trial." App. 23a.

Leonetti's testimony in the fourth trial was that he and Scarfo had gone to Fort Lauderdale "two to three days after Christmas" in 1985. When questioned about the time of his alleged first meeting with Petitioner, Leonetti responded: "I think it was before New Year's." (1/17/95 Tr. 19). When asked how soon after this meeting the second meeting occurred, Leonetti responded: "Not long. It could have been a couple days, two, three days." *Id.* at 22.

The government argued during closing that Petitioner's testimony from the first trial corroborated Leonetti's testimony, because Petitioner admitted having been at the residence on two occasions. The

prosecutor also told the jury that a finding of guilt on RA 60 was "critical to the racketeering count" because RA 60 "is the only racketeering act within the five year statute of limitations for Count 55." Petitioner was convicted in the fourth trial on the RICO count and on 46 of the wire fraud counts. App. 21a.

8. Prior to the fourth trial, Petitioner filed his first § 2255 motion, challenging his conviction under Count 54 due to the government's previous failure to disclose the surveillance reports and other *Brady* material (Wolverton's and Kurtz's rough notes). App. 21a. The district court deferred ruling until after the trial and then denied the motion, holding that the evidence of surveillance at Scarfo's residence was neither exculpatory nor material. App. 21a. The Third Circuit emphatically reversed that ruling:

> We have no hesitation in concluding that the government inexplicably failed to abide by its obligation under *Brady* to disclose potential impeachment evidence. . .Pelullo argues that the withheld evidence clearly would have been utilized by the defense during his first trial to undermine the government's case on Count 54. . . .We agree. . . .[T]he reference to 'Summer 1986' in Agent Wolverton's rough notes of his interview with Leonetti, which was not included in his report, arguably supported Pelullo's claim that the loan to DiSalvo was not paid off until August or September 1986, instead of February 1986 as the government contended at trial. Finally, in theory, *the FBI's surveillance tapes, which do not include any mention of Pelullo, could have undermined the credibility of Leonetti's claim that he met with Pelullo at Scarfo's Florida home sometime in January 1986 to discuss repayment of the DiSalvo loan. . .*

App. 25a-26a (citations and footnote omitted; emphasis added).

The court held that the suppressed evidence was material to Count 54 because "the credibility of the government witnesses was so central to the government's case," and the "jury very well could have reached a different verdict had Pelullo been armed with this

impeachment evidence." App. 27a. Because Petitioner had been in possession of the evidence prior to the fourth trial, however, the court held that the verdict on the RICO count was not affected by the *Brady* violation.

Petitioner also challenged the government's introduction of his testimony from the first trial because that testimony had been the result of the government's *Brady* violations. The Third Circuit remanded to the district court for a determination of whether Petitioner would have testified in the first trial, the *Brady* violations notwithstanding. The district court found that Petitioner would have testified even if the suppressed evidence had been made available. *United States v. Pelullo*, 6 F. Supp. 2d 403, 422 (E.D.Pa. 1998), and the Third Circuit affirmed. *United States v. Pelullo*, 173 F.3d 131, 138-44 (3d Cir.), *cert. denied*, 528 U.S. 824 (1999).

9. In 1998, Petitioner filed a § 2255 motion seeking to set aside the RICO and wire fraud convictions. The motion was based in part on a previously-suppressed FBI 302 prepared by Special Agent Richard McKeen on March 18, 1986. Petitioner also submitted a second previously-suppressed memorandum by Trooper Joseph P. Moran of the Pennsylvania State Police relating to surveillance of Scarfo's residence during the December 1985-January 1986 period. App. 4a.

The McKeen 302 recites that surveillance operations were conducted at Scarfo's residence between December 28, 1985 and February 11, 1986 by the FBI and a Fort Lauderdale-based law enforcement group known as the Metropolitan Organized Crime Intelligence Unit (MOCIU). According to McKeen's report, the residence was under surveillance on January 4-5, 25, 29-30, 1986, as well as several dates in early February 1986. All individuals seen by the surveillance operatives at Scarfo's residence are identified in the report. Petitioner's name does not appear therein.

Similarly, Trooper Moran's investigative report, which details the surveillance operations at Scarfo's residence, does not mention Petitioner. The report states that Moran was detailed to work on the surveillance on January 2, 1986; that he flew to Fort Lauderdale the following day, meeting with two FBI agents at the MOCIU headquarters upon his arrival. From January 4 through January 5, 1986,

Moran participated in the surveillance. His report lists 26 identified individuals who were present at the residence for a party and states that "all persons arriving and leaving Scarfo's residence" were recorded on videotape and still photographs. The photographs and videotape were to be forwarded to Moran after being copied. App. 6a.

On January 5, 1986, FBI agents took photographs that agents from "all participating agencies" reviewed. Moran left Florida the following day. His report further states: (1) "[s]urveillance reports from 27 Dec[ember] 85 through 5 Jan[uary] 86 *inclusive* submitted by officers of MOCIU"; and (ii) [a]dditional surveillance reports from Oct[ober] and Nov[ember] submitted by MOCIU officers will be forwarded to a reporting officer along with photos and [v]ideo [c]assettes which were taken on 4 Jan[uary] 1986." *Id.* at 3 (emphasis supplied). Petitioner is not identified in any portion of Moran's report as having been present at Scarfo's residence.

Additional newly discovered evidence was obtained from parole hearings concerning Salvatore Merlino before the New Jersey Parole Board in January and February 1987. Moran testified at one of the hearings that "there were surveillance reports done by each of the investigating units" involved in the Scarfo surveillance. Another Pennsylvania State Police Officer, Charles W. Conley, testified at the same hearing that the state organized crime unit had "a regular interchange of information" with other agencies, including the FBI. Finally, the testimony established that agents covering the Scarfo family had been working around the clock (in two surveillance teams that worked 10:00 a.m. - 6:00 p.m. and 6:00 - 2:00 a.m. shifts) since March 1981, following a mob-related murder (Testimony of Walter Coughlin, 1/20/87 Tr. 14).

10. Petitioner presented the testimony of Steven Bertucelli, the former Director of the Organized Crime Division of the Broward County Sheriff's Office, during the hearing on his § 2255 motion. App. 9a. In his former official capacity, Bertucelli participated in the MOCIU. The 1986 report of the MOCIU reflects "numerous surveillances" of Scarfo, which produced "numerous surveillance videos, photographs and information which was needed in Scarfo investigations being conducted not only by the FBI, but by the New Jersey Police, Pennsylvania Police, Pennsylvania Crime Commission

and Philadelphia Police Department." Based on his review of MOCIU surveillance records maintained by the Broward County Sheriff, including files reflecting the surveillance conducted on Scarfo's residence from December 1985 and January 1986, Bertucelli learned that the surveillance had been "intensive" and "continuous." Similar to Trooper Moran's report, Bertucelli's review reflected the sharing of information among the various agencies and direct communication among these agencies on a "day to day basis."

11. The district court ruled that Petitioner had access to the McKeen and Moran reports prior to the third and fourth trials. It further claimed that the Moran report was not "a document within the possession and control of the government or any agency participating in the investigation." App. 7a.

The court additionally asserted that neither the McKeen or Moran reports constituted favorable evidence, because "the surveillance was not continuous" and "any one of the unidentified white males" observed by the surveillance teams "could have been Pelullo." App. 8a. Finally, the court relied on Petitioner's testimony from the first trial to conclude that he had "admitted being in Scarfo's house on two occasions," and that "neither the timing nor the fact of the meeting between Leonetti and Pelullo were critical to convicting Pelullo on RA 60." App. 10a.

12. The court's order denying the § 2255 motion also refused Petitioner a COA without explaining its action, thus denying Petitioner the ability to exercise his substantive right to seek a COA from the court upon appealing its decision. App. 18a. Moreover, the court ignored its duty under F.R.App. P. 22(b)(1) to articulate "why a certificate should not issue," instead following the contrary 3d Circuit Local Appellate Rule 22.2, which provides: "If an order denying a petition under. . .§ 2255 is accompanied by an opinion. . .it is sufficient if the order denying the certificate references the opinion or report."

13. Petitioner filed a timely application for a COA in the Third Circuit which argued forcefully that he was not in possession of the McKeen or Moran reports and had no access to these documents. He further emphasized that these documents were material under the

controlling principles of *Kyles v. Whitley*, 514 U.S. 419 (1995).

In response to Petitioner's materiality argument, the government wrote one (1) sentence: "[T]he district court found that even if the McKeen Report and the Moran Report had been suppressed, these documents do not constitute *Brady* material."

14. On November 12, 2002, in a one paragraph order, the Third Circuit denied Petitioner's request for a COA *per curiam*. The court did *not* find that (a) Petitioner was in possession of the McKeen or Moran reports or (b) he had access to these documents. App. 1a. Thus, the Third Circuit tacitly acknowledged that the district court's conclusions on these issues were erroneous.

The lone reason provided by the Third Circuit for denying a COA was that Petitioner "has failed to show that there is a reasonable probability that, had the McKeen Report and Moran Report been disclosed to the defense during the 1995 trial, the result of the proceeding would have been different." App. 1a.

REASONS FOR GRANTING THE WRIT

I.

PURSUANT TO THIS COURT'S DECISION IN *SLACK V. MCDANIEL*, WHEN A COURT OF APPEALS REVIEWS A COA PETITION, IT MUST ONLY DETERMINE WHETHER REASONABLE JURISTS *COULD DEBATE* WHETHER A COA PETITION DEMONSTRATES A DENIAL OF A CONSTITUTIONAL RIGHT, NOT WHETHER THE PETITIONER IS ACTUALLY ENTITLED TO RELIEF.

Under 28 U.S.C. § 2253(c)(2), either the district court or the court of appeals must issue a COA when the Petitioner makes a "substantial showing of the denial of a constitutional right." This Court has held that this standard is satisfied, and a COA must issue, when "*reasonable jurists could debate* whether. . .the [§ 2255] petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v.*

McDaniel, 529 U.S. 473, 484 (2000) (*citing Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)) (emphasis added). *Slack* cited with approval *Barefoot's* admonition at 463 U.S. at 893 n. 4, that "obviously the petitioner need not show that he should prevail on the merits [since h]e has already failed in that endeavor." *Slack*, 529 U.S. at 483-84.

In the case at bar, the Third Circuit failed to examine whether "reasonable jurists would debate" whether the *Brady* claims raised in Petitioner's COA request had merit. Instead, the court reviewed Petitioner's request under an incorrect standard, viz., whether the result of Petitioner's 1995 trial would probably have been different had the government disclosed the McKeen and Moran reports to the defense. App. a. Simply put, the court erroneously required Petitioner *to prove* at the COA stage that he was entitled to a new trial, not merely that *it was debatable* whether he was so entitled.

This Court made clear in *Slack* that courts of appeals must grant COA's in cases of obvious *or even debatable* merit. The COA requirement is designed to weed out frivolous or facially meritless post-conviction appeals. It is not, however, supposed to eliminate appeals that jurists of reason might debate, since *Slack* requires debatable questions be resolved by the normal appellate safeguards -- briefing, review of the record, and oral argument -- instead of by abbreviated COA procedures. Had this Court intended otherwise, it would have held in *Slack* that COA's must issue only when jurists of reason *find merit* in an issue.

1. Jurists of reason would debate whether the newly discovered evidence presented in Petitioner's § 2255 motion would undermine the credibility of the government's central witness, thus entitling Petitioner to a COA.

When the appropriate *Slack* standard is applied to this case, it becomes clear that Petitioner is entitled to a COA, for jurists of reason would debate his *Brady* claim. The three components of a *Brady* claim are: (1) the evidence must be favorable to the accused, because it is either exculpatory or impeaching; (2) the evidence "must have been suppressed by the government, either willfully or inadvertently"; and

(3) the defendant must have suffered prejudice from the suppression of favorable evidence. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The controlling constitutional standard of materiality, set forth in *Kyles v. Whitley*, *supra*, is as follows:

> a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal... The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'[1]

Id., 514 U.S. at 434. Moreover, materiality "is not a sufficiency of evidence test," and "a defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-35.

Although a reviewing court must "evaluate the tendency and force of the undisclosed evidence item by item," "materiality" ultimately is determined "in terms of suppressed evidence considered collectively, not item-by-item." *Id.* at 436 & n. 10.

In view of *Pelullo III*, the suppressed evidence at issue in the instant case clearly is material. The Third Circuit held in *Pelullo III* that the FBI's surveillance tapes turned over to Petitioner prior to his third trial were material, since they "do not include any mention of Pelullo [and therefore] could have undermined the credibility of Leonetti's claim that he met with Pelullo at Scarfo's Florida home

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[1] As discussed *infra* at page 16, the Third Circuit applied the wrong materiality standard. The court denied Petitioner a COA on the ground that disclosure of the McKeen and Moran reports would not have changed the result of Petitioner's 1995 trial, App. 1a, precisely the test *Kyles* proscribes. The Third Circuit order refers to *Kyles but does not follow its teaching.*

sometime in January 1986 to discuss repayment of the DiSalvo loan." App. 26a. Indeed, the court recognized the favorable nature of the then-discovered surveillance evidence despite the fact that it covered only twelve days during January 1986. *Id.* This evidence was therefore material "whether considered separately or collectively" with the other *Brady* material (FBI agent Wolverton's rough notes and agent Kurtz's rough notes of his interview with Leonetti). *Id.*; *see also United States v. Pelullo*, 173 F.3d 131, 138 n. 5 (describing the FBI surveillance logs as "*Brady* material").

The newly-discovered surveillance evidence presented in Petitioner's § 2255 motion confirms surveillances at Scarfo's residence from December 27, 1985 through January 5, 1986, precisely the time that Leonetti claimed to have met with Petitioner.[2] The veracity of that evidence is confirmed by Mr. Bertucelli's testimony before the district court, as well as by Trooper Moran's report. *Pelullo III* recognized that the credibility of the government witnesses was "central to the government's case" and, indeed, was the "linchpin of the government's case" on Count 54, which had the same predicate as RA 60. App. 27a.[3] Because of the damage this newly-discovered evidence would have caused to Leonetti's testimony, it was clearly material under *Kyles*. *See also Boss v. Pierce, 263* F.3d 734, 745 (7th Cir. 2001) (where government's case rests primarily upon one witness's testimony, making his credibility crucial to the outcome, the government's suppression of evidence that compromises witness's credibility

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[2] Leonetti testified that he first met Petitioner "two to three days after Christmas" in 1985. (1/17/95 Tr. 19), and their second meeting took place two to three days later. *Id.* at 22.

[3] Indeed, AUSA Cole's own statements in response to Petitioner's motion to exclude Leonetti's testimony in the first trial underscore Leonetti's importance to the government's case. AUSA Cole told the district court that Leonetti was critical to proving Count 54 and RA 60 because, "on the face of it, it looks like a perfectly legitimate transaction." (1/24/91 Tr. 152). Leonetti's testimony, said Cole, was "critical to the case because it circumstantially establishes that the [$114,000 wire transfer] was used for personal purposes," i.e., to repay DiSalvo. *Id.* at 148. Cole described Leonetti's testimony as "my evidence" to show the repayment to DiSalvo. When the court asked whether he had "no other evidence," Cole responded: "No, sir." *Id.* at 150.

"undermines our confidence in the jury's verdict" and makes "the withheld evidence. . .material for *Brady* purposes").

The evidence in Petitioner's possession prior to the third and fourth trials established that Leonetti and Scarfo were in Florida between December 27, 1985 and January 8, 1986, and that there were surveillances on Scarfo's house on December 27, 28 and 29, 1985. The newly-discovered evidence presented in Petitioner's § 2255 motion, particularly Moran's report, proves that surveillance also was conducted on January 4-5, 1986, which dates are corroborated in the McKeen report. Moreover, Moran's report used the word "inclusive" to describe the surveillance records from December 27, 1985 through January 5, 1986, demonstrating the continuous nature of the surveillance during this period. Since *Pelullo III* held that the sporadic surveillance disclosed to Petitioner prior to his third and fourth trials was sufficiently material to warrant vacating the conviction on Count 54, then the import of the newly-discovered suppressed evidence is undeniable.

It bears mention that the introduction during Petitioner's fourth trial of his testimony from the first trial was the only "noteworthy" difference between the fourth trial and the third trial, in which the jury deadlocked. App. 21a. The record reflects that the government used Petitioner's prior testimony to bolster Leonetti's credibility. AUSA Cole argued to the jury that Leonetti is "telling the truth" because "Leonard Pelullo admitted under oath that he was at Scarfo's house," and therefore Petitioner's testimony "corroborate[d] Philip Leonetti's testimony." (1/24/95 Tr. 154, 157). The newly- discovered evidence would have severely damaged Leonetti's testimony and would have negated the government's attempt to bolster Leonetti's credibility through Petitioner's prior testimony. Furthermore, Petitioner only took the stand during his first trial because of the government's failure to honor its *Brady* obligations. Without the newly-discovered evidence in hand, he had no other way to impeach Leonetti's credibility.

Because the newly-discovered evidence presented in Petitioner's § 2255 motion entitles him to a COA, thus bringing into

question all of his remaining convictions[4], a writ should issue.

II

A COURT OF APPEALS CANNOT DENY A COA ON THE GROUND THAT THE PETITIONER CANNOT DEMONSTRATE THAT DISCLOSURE OF *BRADY* MATERIALS WOULD HAVE CHANGED THE RESULT OF HIS TRIAL, A STANDARD PROSCRIBED BY THIS COURT IN *KYLES v. WHITLEY*.

The Third Circuit denied Petitioner a COA on the ground that he "failed to show that there is a reasonable probability that, had the McKeen report and the Moran report been disclosed to the defense during the 1995 trial, *the result of the proceeding would have been different*." App. 1a. As discussed above on page 12, however, the proper standard of review under *Kyles* is not whether introduction of the suppressed evidence would have changed the result of trial, but whether the *absence* of the suppressed evidence "resulted in a verdict [un]worthy of confidence." *Id.*, 514 U.S. at 434. And, as discussed above, Petitioner submitted substantial evidence that the absence during his trials of the evidence presented in his § 2255 motions *did* undermine confidence in the result. Because the Third Circuit invoked the wrong standard of review in resolving Petitioner's *Brady* claims, a writ should issue.

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[4] A different outcome on Count 54 and RA 60 undoes the RICO conviction on Count 55, because RA 60 is the only racketeering act within the statute of limitations. *Pelullo II*, 14 F.3d at 897. Moreover, this Court also held in *Pelullo II* that "the wire fraud counts are sufficiently similar to [RA 60] so as to create substantial confusion on the part of the jury," *id.* at 898, and that the tenor of the evidence introduced to prove Count 54 and RA 60 was likely to arouse the jury's prejudices against Petitioner. *Id.* at 899-900. Accordingly, jurists of reason could debate whether the absence of the newly-discovered evidence caused all of Petitioner's convictions.

III

A COURT OF APPEALS CANNOT, CONSISTENT WITH F.R.APP.P. 22(B)(1), ADOPT A LOCAL RULE EMPOWERING DISTRICT COURTS TO DECLINE A COA BEFORE AN APPEAL IS FILED OR A CERTIFICATE REQUESTED, AND WITHOUT STATING WHY THE CERTIFICATE DID NOT ISSUE.

Third Circuit LAR 22.2 violates F.R.App.P. 22(b)(1) by permitting the district court to deny a COA, without explanation, at the same time it denies relief under 28 U.S.C. § 2255. To bring the Third Circuit's rule into conformity with the Federal Rules of Appellate Procedure, and to protect Petitioner's substantive rights under those provisions, a writ should issue.

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)[5] reformed federal habeas corpus practice by substantially limiting appeals and precluding successive filings absent extraordinary circumstances. Section 102 of the AEDPA prescribes that the petitioner can appeal an adverse § 2255 decision to the court of appeals only if a "circuit court or judge" issues a COA attesting to a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1).

To implement the AEDPA, F.R.App.P. 22(b)(1) was amended to bifurcate consideration of the § 2255 motion from any later COA determination. As amended, F.R.App.P. 22(b)(1) provides:

> If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a [COA] or state why a [COA] should not issue. The district court must send the [COA] or statement to the court of appeals with the notice of appeal and the file of the district court proceedings. [Emphasis added].

The mandatory term "must" replaces the term "shall" in prior Rule 22(b)(1), a revision clearly intended to preclude any deviation from new

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[5] Pub.L.No. 104-132, April 24, 1996.

Rule 22(b)(1)'s terms. This bifurcated procedure balances the critical function served by the COA with the newly imposed requirement all § 2255 motions be filed with the district court in the first instance.

Most appellate courts have followed new Rule 22(b)(1) faithfully.[6] Third Circuit LAR 22.2, however, directly contradicts F.R.App.P. 22(b)(1) by authorizing the district court to deny a § 2255 petitioner his right to an independent COA determination and the explanation of an adverse result:

> At the time a final order denying a petition under 28 U.S.C. § 2254 or § 2255 is issued, the district judge shall make a determination as to whether a [COA] should issue. . .If an order denying a petition under §2254 or §2255 is accompanied by an opinion or a magistrate judge's report, it is sufficient if the order denying the [COA] references the opinion or report.

In the instant case, the district court followed Third Circuit LAR 22.2's defective procedure instead of the bifurcated procedure mandated by F.R.App.P. 22(b)(1). At the same time the district court denied Petitioner's § 2255 motion, it refused to issue a COA without explaining why a COA should not issue.

Since the district court erred by following Third Circuit LAR 22.2, this rule should be stricken as conflicting with the Federal Rules of Appellate Procedure. *See* F.R.App.P. 1(a)(1) (federal rules of appellate procedure "govern procedure in the United States courts of appeal"); F.R.App.P. 47 (a)(1) (local rules "must be consistent. . .Acts of Congress and rules adopted under 28 U.S.C. § 2072"). Supreme Court Rule 10 explains that a writ of certiorari is appropriate where, as here, a court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a

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[6] The Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, District of Columbia and Federal Circuits have not adopted any local rules expanding upon F.R.App.P. 22(b)(1), while the First, Second and Eleventh have merely conformed their practices to the new rule. *See also United States v. Mitchell*, 216 F.3d 1126, 1130 (D.C. Cir. 2000); *Muniz v. Johnson*, 114 F.3d 43, 45-46 (5th Cir. 1997).

lower court." To correct the Third Circuit's illegal rule, and to provide Petitioner his substantive right to a "first level" COA ruling,[7] the writ should issue[8].

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted:

JOSEPH M. FIORAVANTI
217 NORTH MONROE ST.
MEDIA, PA 19063
(610) 892-7370

February 10, 2002

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[7] *See Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977) ("The absolute power of a district judge to allow a habeas appeal by granting a certificate of probable cause implies that the right to a 'first level' ruling is substantive"); *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) ("we must be careful to avoid conflating the standard for gaining permission to appeal with the standard for obtaining a writ of habeas corpus").

[8] Although *Slack* notes the observation in *Barefoot* that "obviously the petitioner need not show that he should prevail on the merits [since h]e has already failed in that endeavor," *Slack*, 529 U.S. at 483-84, 3d Cir. LAR 22.2's requirement that the district court make the COA determination coincident with its denial of habeas corpus relief masks, if not obviates, this critical distinction to Petitioner's substantial prejudice.

UNITED STATES OF AMERICA
v.
LEONARD A. PELULLO

C.A. No. 01-2326
United States Court of Appeals for the Third Circuit
November 12, 2002

Present: Nygaard, Roth, and Barry, Circuit Judges

ORDER

Appellant's request for certificate of appealability is denied. Appellant has failed to make a substantial showing of the denial of his constitutional right to a fair trial. *See* 28 U.S.C. section 2253(c)(2); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Specifically, appellant has failed to show that there is a reasonable probability that, had the McKeen report and Moran report been disclosed to the defense during the 1995 trial, the result of the proceeding would have been different. *See United States v. Bagley*, 473 U.S. 667, 682 (1985); *see also Pelullo II*, 14 F.3d 881, 886-887 (3d Cir. 1994) (*quoting Bagley*, 473 U.S. at 682, and explaining that this Court will reverse the District Court judgment only when the *Brady* evidence would produce a "reasonable probability that the result of the proceeding would have been different").

UNITED STATES OF AMERICA
v.
LEONARD A. PELULLO

CR. NO. 91-60
Civil Action No. 98-325
United States District Court for the
Eastern District of Pennsylvania
April 24, 2001

Presently before the Court is Leonard A. Pelullo's ("Pelullo") Petition under 28 U.S.C. § 2255 challenging his 1995 convictions.

PARTIAL HISTORY[1]

In February 1991, the Grand Jury returned a multi count indictment against Pelullo charging him with wire fraud and racketeering. The Indictment averred that Pelullo had conducted several fraudulent schemes to divert corporate funds to his personal use. The fraudulent diversions included a February 25, 1986 wire transfer of $114,000 from a corporate bank account to the Palm Beach Heights Development Corporation ("PBH") to a bank account in Philadelphia controlled by Pelullo. The fraudulent wire transfer was charged as a wire fraud violation (Count 54) and a racketeering act ("RA 60") in the

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[1]I believe the partial history is sufficient in order to deal with the present Petition. Any additional history can be found at the following locations: U.S. v. Pelullo, 1992 WL 245915 (E.D.Pa. Sept. 16, 1992); *U.S. v. Pelullo,* 1993 WL 30069 (E.D.Pa. Feb. 6, 1993); *U.S. v. Pelullo,* 1993 WL 88288 (E.D.Pa. Mar. 26, 1993); *U.S. v. Pelullo,* 1993 WL 216127 (E.D.Pa. June 18, 1993); *U.S. v. Pelullo,* 1993 WL 418358 (E.D.Pa. Oct. 15, 1993); *U.S. v. Pelullo,* 1994 WL 236481 (E.D.Pa. May 17, 1994); *U.S. v. Pelullo,* 895 F.Supp. 718 (E.D.Pa. Aug. 8, 1995); *U.S. v. Pelullo,* 1996 WL 257345 (E.D.Pa., May 10, 1996); *U.S. v. Pelullo,* 6 F.Supp.2d 403 (E.D.Pa. June 9, 1998); *U.S. v. Pelullo,* 964 F.2d 193 (3d Cir.1992), *reh'g denied,* (14 F.3d 881 (3d Cir.1994)); *U.S. v. Pelullo,* 14 F.3d 881 (3d Cir.1994) *reh'g and reh'g in banc denied* (14 F.3d 881 (3d Cir.1994)); *U.S. v. Pelullo,* 105 F.3d 117 (3d Cir.1997); *U.S. v. Pelullo,* 173 F.3d 131 (3d Cir.1999); *U.S. v. Pelullo,* 178 F.3d 196 (3d Cir.1999); *Pelullo v. U.S.,* 528 U.S. 824, 120 S.Ct. 72, 145 L.Ed.2d 62 (1999).

racketeering count (Count 55).

At trial, in June of 1991, the Government's evidence established that Pelullo had diverted the $114,000 from the PBH account to repay a personal debt he owed to Anthony DiSalvo, a loan shark associated with the Philadelphia Mafia. The Government's evidence showed that Pelullo had met with Nicodemo Scarfo and Phillip Leonetti, members of the Philadelphia Mafia at Scarfo'sresidence in Florida to discuss repayment of the debt Pelullo owed to the loan shark. According to Leonetti, who testified for the Government, this meeting occurred after Christmas Day of 1985, but before a date in the early part of January 1986 when Scarfo and Leonetti returned to Philadelphia. The Jury convicted Pelullo of Count 54 and Count 55, finding that RA 60 had been established. On appeal, the United States Court of Appeals affirmed the conviction on Count 54, but vacated the conviction on Count 55 and ordered a new trial. *See United States v. Pelullo,* 964 F.2d 193 (3d Cir.1992).

In October 1994, the Government produced to Pelullo copies of surveillance logs of physical surveillance conducted at Scarfo'sFlorida residence for the period January 1 through January 31, 1986. (Defense Exhibit No. 1). The Government also disclosed that surveillance had been conducted at Scarfo'sresidence on December 27, 28 and 29, 1985. (Defense Exhibit No. 2). Following a retrial in January 1995, a jury convicted Pelullo of Count 55, finding that RA 60 had been established, and multiple wire fraud counts. The Third Circuit Court of Appeals affirmed these convictions. *See United States v. Pelullo,* 173 F.3d 131 (1999). Pelullo filed a prior petition under 28 U.S.C. § 2255 alleging that Count 54 should be vacated because the Government had failed to produce three pieces of evidence, including the surveillance logs, which the Government turned over to him in October 1994, which constituted exculpatory evidence under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) that should have been turned over to him before the 1991 trial. The Third Circuit vacated the conviction on Count 54. *See United States v. Pelullo,* 105 F.3d 117 (1997).

PELULLO'S JANUARY 21, 1998 § 2255 PETITION

This present petition challenges the 1995 convictions. The hearing on

this petition was delayed because Pelullo was in federal custody in the state of Florida awaiting trial on a separate federal criminal indictment. Pelullo, and his counsel, requested that the hearing be continued until such time as he could be present. Because this Court is aware that Mr. Pelullo has always taken an active part in his various court proceedings, I agreed. When Pelullo finally became available, this Court, after consultation with the attorneys, scheduled a hearing for August 24, 2000. On August 11, 2000, Pelullo filed a motion seeking court-authorized discovery in connection with his § 2255 Petition, which at that point had been pending for thirty-two (32) months. He also requested an indefinite continuance of the hearing scheduled for August 24, 2000 so that he could search for additional surveillance material. On August 22, 2000, this Court denied Pelullo's motion for discovery and a continuance. At the August 24, 2000 hearing, counsel for Pelullo called Stephen Bertucelli to testify regarding the issue of surveillance of Scarfo's residence and produced exhibits relating to that issue. Although Pelullo was present at the hearing, he did not testify.

The Petition alleged that the Government failed to produce the following items: (a) surveillance records of Scarfo's residence; (b) an FBI Form 302 Report by Special Agent Gary Scalf ("the Scalf Report"); (c) information about Government payments to Leonetti; and (d) 37 additional pieces of evidence. Pelullo alleged that each of these items constituted *Brady* material. *See* Petition at 5-7.

On March 26, 1998, the Government filed its response to Pelullo's Petition opposing his contention that the Government had failed to produce *Brady* material. At the conclusion of the August 24, 2000 hearing, Pelullo withdrew his contention that the Government had failed to produce 37 additional items of alleged *Brady* material. (Tr. at 96). Pelullo also acknowledged that he was not pursuing the claims that the Government had failed to produce the Scalf report and the information regarding payments to Leonetti.*Id.* Pelullo's counsel also acknowledged that his *Brady* claim was limited to specific items: an FBI Form 302 Report prepared by Special Agent Richard McKeen and a surveillance report prepared by Pennsylvania State Trooper Joseph P. Moran. Pelullo also asserted that any surveillance records revealed by these reports, which had not been produced, would also constitute *Brady* evidence.

PELULLO HAS FAILED TO ESTABLISH THAT HE DID NOT POSSESS THE McKEEN AND MORAN REPORTS PRIOR TO OR DURING THE 1995 TRIAL.

At the evidentiary hearing, Pelullo failed to offer any evidence as to when he received those reports. At that hearing, the Court asked the following question:

THE COURT: When did you get Moran's report? Do you know the date?

MR. WERBEL: I do not have the date, Your Honor. My understanding is that it was at some point this year, earlier this year we received Agent Moran's report from another attorney that had been given it from the U.S. Attorney in their case.

THE COURT: Okay. And the other, McKeen?

MR. WERBEL: The McKeen report was part of our original Section 2255 that was filed, and we've had that, and that was also Your Honor from another attorney that received it from a different U.S. Attorney in a different matter.

The only other references to this issue were the following:

Pelullo's counsel represented at the hearing that the Moran report was received on January 28, 2000, from a defense attorney in another matter. (Tr. at 81-82);

Pelullo's counsel represented in his Proposed Findings of Fact that Pelullo received the Moran report from another defense attorney in January of 2000;

Pelullo's counsel represented in his Proposed Findings of Fact that Pelullo received the McKeen report from Robert Simone but does not state when he received it.

This is a uniquely important issue in this case because we know that counsel for Pelullo has represented that Pelullo obtained the McKeen report from Robert Simone. This is the same source from whom Pelullo obtained the Kurtz memorandum, a document that was part of the basis for Pelullo's first Section 2255 Petition. On March 8, 1993, Pelullo filed a Motion for a New Trial based on newly discovered evidence, in which Pelullo's counsel stated: "he obtained the [Kurtz] memorandum from the defense in the case of *United States v. Simone and DiSalvo* sometime

during the second [Pelullo] trial." Motion at 4. Since Pelullo obtained discovery material relating to the government's proof of the DiSalvo transaction from Simone in January of 1993, and since Pelullo has represented that he obtained the McKeen report from the same source but without specifying when he received it, the reasonable inference is that Pelullo could have obtained the McKeen report from Simone as early as January 1993. It is crucial to Pelullo's claim that he establish that he did not possess this material prior to or during the 1995 trial, and he has failed to do so. In the reply to the Government's position on this point, Pelullo's counsel attempted to remedy this failure by introducing arguments of counsel about the circumstances of how and when Pelullo obtained these materials. *See* Reply at 12-13. I find that arguments of counsel in a legal memorandum do not constitute competent legal evidence. The Moran report was prepared by a Pennsylvania State Trooper from his own observations and from reports in the custody of the Metropolitan Organized Crime Intelligence Unit ("MOCIU"). I have reviewed the Moran report (Defense Exhibit 3) and compared it to the surveillance logs and disclosures made to Pelullo during the 1995 trial (Defense Exhibit 1, 2). I find that the Moran report is a partial summary of the much more detailed information contained in the disclosures made to Pelullo before the 1995 trial. The Moran report does not identify any surveillances or results of surveillances that were not disclosed to Pelullo before the 1995 trial.

I find that Pelullo has failed to establish that the McKeen report and the Moran report were suppressed within the meaning of *Brady v. Maryland,* and has, therefore, failed to establish a *Brady* violation. I find also that Pelullo has failed to establish that the Moran report was a document within the possession or control of the Government, subject to disclosure under *Brady.* Trooper Moran was a Pennsylvania State Trooper. His report indicates that he was participating in the surveillance of the Scarfo house in connection with a separate investigation of Joseph Pungitore. *See* Defense Exhibit 3, at 1. The McKeen report identifies the agencies participating in the surveillance, but does not identify the Pennsylvania State Police as one of the participating agencies. *See* Defense Exhibit 4, at 1. There has been no evidence produced showing that the Moran report was in the possession and control of the Government. The Court finds, therefore, that Pelullo

has failed to establish that the Moran report was a document within the possession and control of the Government or any agency participating in the investigation.

PELULLO HAS FAILED TO ESTABLISH THAT THE McKEEN AND MORAN REPORTS WERE MATERIAL TO HIS DEFENSE.

In October of 1994, the Government produced surveillance logs of Scarfo'sresidence that covered the period from January 2, 1986 through January 31, 1986. (Defense Exhibit 1). In addition, the Government disclosed that surveillances were conducted of Scarfo's house on December 27, 28, and 29, 1985 (Defense Exhibit 2). I have reviewed the surveillance records designated Defense Exhibit 1, and I note that of the persons observed on the dates of January 2, 4, and 5, 1986, there are dozens with the notation "WM", which means "white male," seen arriving or leaving the residence. Some notations indicate that a photograph was taken. I made a rough count of the unidentified white males arriving during the surveillance of January 4, 1986. From that count, I would say that there were at least 40 unidentified white males seen arriving or talking at those premises. This figure does not include unidentified white males who arrived in automobiles where the license numbers were recorded, nor does it include notations of unidentified white males leaving the premises. In reviewing this surveillance log for January 2, 1986, I note that during the relatively short period that it was conducted, five unidentified white males arrived in vehicles where the license numbers were not recorded, and two other vehicles arrived where the license numbers were recorded but each vehicle contained three unidentified white males. The license numbers of those vehicles might lead to the identification of one of the males in each car, but not to the other four. Therefore, in that short period of time, nine unidentified white males arrived at the Scarfo residence.

A review of the surveillance logs for this period also reveals that surveillances were not conducted every day, and on days when surveillance was conducted, it was not conducted for the entire day and night. I also note that vehicle license numbers were often not recorded and the photographing of people entering and leaving the Scarfo residence was the exception rather than the rule.

Pelullo contends that the surveillance records were material to his defense because they would conclusively establish that he was not present at Scarfo'sresidence at any time during the period December 26, 1985 through January 8, 1986 and, therefore, Leonetti must have lied when he testified that Pelullo met with Scarfo at this time to discuss the DiSalvo debt. It is plain from the above, that these records would not help establish that proposition. Any one of the unidentified white males could have been Pelullo. In any event, as has been stated before, the surveillance was not continuous.

The information in the Moran report is merely a partial summary of the more detailed information contained in the surveillance logs which were produced to Pelullo for the 1995 trial. (Defense Exhibits 1 and 2). Therefore, the Moran report would not constitute Brady material because the information contained in it had been given to Pelullo for the 1995 trial. (Defense Exhibit 1).

Pelullo contends that the Moran report constitutes *Brady* evidence because a statement in the report establishes that Trooper Moran received "surveillance records for each day between December 27, 1985 and January 5, 1986." (Proposed Findings at ¶¶ 48). Pelullo contends that Trooper Moran intentionally used the word "inclusive" in his report when he made the following statement:

"Surveillance records from 27 Dec 1985 through 5 Jan 1986 inclusive submitted by Officers of MOCIU."

Pelullo interprets Moran's use of the word "inclusive" to mean that there were surveillances of Pelullo's house every day during the period December 27, 1985 through January 5,
After reviewing Defense Exhibits 1 and 2, which are the surveillance records disclosed to Pelullo before the 1995 trial, I find that the only reasonable interpretation of Trooper Moran's use of the word "inclusive" is that he reviewed surveillance reports for the dates December 27, 28, and 29, 1985 and January 2, 4, and 5, 1986, and not

to imply that there were surveillances at Scarfo's residence every day during this period. If Trooper Moran intended to give the word "inclusive" anything other than its ordinary meaning, Pelullo could have called Trooper Moran as a witness to testify to this fact at the hearing. He did not do so.

STEVEN BERTUCELLI

Pelullo hired Mr. Bertucelli, a private investigator, to review the MOCIU surveillance records for December 1985 and January 1986. Bertucelli testified that he had access to those records and reviewed them. He testified that he did not ask for copies of the records and did not take any notes about the records during his review. He further testified that he was hired simply to determine whether such surveillance records existed and that he was not instructed to obtain copies. (Tr. 59, 68-69, 73). I do not believe when considering all of the facts surrounding this case that if material surveillance reports existed in the MOCIU records, Pelullo would not have directed Bertucelli to obtain them so that Pelullo could produce them at the hearing.

To the extent that Bertucelli's testimony is offered to establish the frequency and duration of the surveillance during December of 1985 and January of 1986, that testimony is based on hearsay, and was excluded. (Tr. 53-55).

PELULLO'S TESTIMONY IN THE 1991 TRIAL

In his petition, Pelullo contends that he has "always denied that any meeting with Leonetti ever occurred." But he did not deny being at Scarfo's house on two occasions:

Q. Okay. Have you ever been to his [Scarfo's] home?
A. Yes.
Q. How did that come about?
A. What happened was I was in Miami and a man called me by the name of Sam LaRusso. Sam had worked for my father about 30 years ago as a laborer. And he told me he had a job in Fort Lauderdale, would I come up and help him? I said sure, Sam, I'll be up to see it.
I went up to Fort Lauderdale and when I get there he tells me where I'm

at. I didn't know it was Scarfo's house. And he said Leonard, he said, I need some help here. There's a construction job. I don't have any people here and I need to get a permit. I said, Sam, I don't want to get involved. Don't put me in this position.
And I wasn't threatened, but the situation with Sam was that Sam was a prisoner, basically, until this work was done and he asked me to get him a permit, get him some contractors to get the work done, otherwise he was going to have a problem with these people. And I looked at the job. I sent Keith Swenson there and I said see what you can do about getting him a permit and get him some plans and get the job done and let's get the hell out of here. That's what I told him.
Q. Is that the only time that you were ever at his house?
A. I might have been there twice with Sam, because he needed some technical help on how to do something and I tried to limit my exposure there, yes.
Trial July 1, 1991, p. 200. Also in his closing argument at the first trial, then counsel for Mr. Leonetti argued:

... They bought in a man named Phillip Leonetti, in this case, to try to paint a picture of Leonard Pelullo having some contact with bad people. He's not charged with that. Mr. Leonetti talked about reaching out and putting pressure and muscle on Leonard Pelullo to repay a debt. He got victimized by an admitted ruthless murderer. And then he has been victimized by the Government by their bringing this man before you to try to make it appear that he, Mr. Pelullo is bad because he had some contact with these people, that he borrowed money and had to pay it back.
Trial July 2, 1991, p. 160.

As can be seen in his testimony during the first trial, Pelullo admitted being at Scarfo's house on two occasions. He testified that he went to Scarfo's house for a reason that was not related to the DiSalvo loan, but did not deny meeting Scarfo or Leonetti at the house. Neither the timing nor the fact of the meting between Leonetti and Pelullo were critical to convicting Pelullo on RA 60. The significance of Leonetti's testimony was to establish that Pelullo had a motive to divert corporate funds to his own use in order to repay the DiSalvo debt, and, in fact, the loan was

repaid a few weeks after the February 25, 1986 wire transfer. The government established this motive by proving that Pelullo had an over due loan shark debt to DiSalvo and that Pelullo knew that Scarfo, the boss of the Philadelphia Mafia, and Leonetti, also a Mafia member, wanted him to repay that DiSalvo debt. It was not essential to the proof of the violation that Pelullo learned directly from Leonetti and Scarfo that they were going to enforce the loan. It was admitted by Pelullo himself that he learned this from his brother Peter. The fact that has never been disputed was that Pelullo knew that two powerful Mafia members were telling him to repay the loan. Pelullo's defense has never been a denial of the fact that he owed money to DiSalvo and was pressured by the Mafia to repay it. Therefore, contradicting the government's evidence that Pelullo met with Scarfo and Leonetti at Scarfo's residence in Florida in December 1985 or January 9, 1986 was not critical to Pelullo's defense.

SUBSTANTIAL OTHER EVIDENCE

In addition to Leonetti's testimony, the government introduced substantial other evidence to prove that Pelullo used the $114,000 to repay the DiSalvo loan. Donald McDonald testified that Pelullo directed him to cash a corporate check for $114,000 on February 25, 1986, which the bank refused to do. Pelullo then directed McDonald to wire transfer $114,000 of corporate funds to a corporate account controlled by Pelullo's father. This testimony supported the urgency of Pelullo's immediate need for cash. Pelullo's brother, Arthur, testified that their father wrote several corporate checks payable to cash totaling $114,000, and directed Arthur to cash them. Arthur cashed the checks within a day or two of February 25, 1986. Arthur's testimony also suggested the urgency of Pelullo's need for cash. Leonetti testified that DiSalvo gave him $60,000, which Leonetti understood to be his share of the Pelullo loan repayment. The government also introduced Pelullo's statement to the F.B.I. that he admitted using the $114,000 to repay his debt to Di Salvo. Therefore, even if Pelullo had succeeded in identifying any surveillance records relating to Scarfo's residence, which the government had failed to produce before the 1995 trial, these records would not have rebutted the other substantial evidence the government introduced to establish RA 60.

JUDICIAL ESTOPPEL

Pelullo contends that the doctrine of judicial estoppel precludes the government from "arguing that the McKeen report does not describe continuous surveillance." Reply at 23. Pelullo contends that the government has taken the position with respect to the McKeen report that is inconsistent with the position taken by the Government in a separate criminal proceeding, *United States v. Simone,* No. 91-569, 1998 WL 54387 (E.D.Pa.), *aff'd,* 172 F.3d 42 (3d Cir.1998). According to Pelullo, the government took the position in *Simone,* that the McKeen report indicated that the government maintained "continuous surveillance" on Scarfo's residence during the period December 28, 1985 through February 11, 1986. Reply at 5. Pelullo contends in this case, that the government has taken an inconsistent position by asserting that the McKeen report does not describe continuous surveillance of Scarfo's resident during the period of December 28, 1985 through February 11, 1986.

Assuming that the doctrine of judicial estoppel could be applied against the government in a criminal case, I find that it would not apply to the facts of this case. The government's position in this case is not inconsistent with the position taken by the government in *Simone.* In *Simone,* the government provided the defendant with a copy of the McKeen report in pre-trial discovery. Following his conviction, Simone contended in a Section 2255 petition that the government had suppressed evidence favorable to the defendant in violation of *Brady* because it did not produce the surveillance logs (which the government produced to Pelullo in this case). In response, the government asserted that some of the surveillance information contained in the summary logs had been produced to the defendant in the McKeen report: "[T]he government disclosed some of the surveillance information, albeit in a different form." Government's Response to Petitioner Robert F. Simone's Motion to Vacate, etc., at 19. The government noted that the McKeen report described five of 13 days of surveillance conducted at Scarfo's residence in January 1986 described in the summary logs. *Id.* The government further noted that the McKeen report stated:

"[S]urveillance was conducted during the period December 28, 1985 through February 11, 1986, thus putting petitioner on notice that surveillance exists. Therefore, petitioner could have obtained the additional surveillance information himself through the exercise of due diligence, and therefore, it was not suppressed by the government."

Therefore, the government's position in Simone was that the McKeen report indicated that more surveillance information was available than the specific dates of surveillance summarized in the McKeen report.

In the present case, the government contends that the surveillance logs, which were produced to Pelullo before the 1985 trial, contained more surveillance information than is contained in the McKeen report. Therefore, the government's position in this case is the same position taken by the government in *Simone:* the summary logs contained more surveillance information than is contained in the McKeen report. The government has not taken inconsistent positions with respect to the McKeen report which would be a necessary prerequisite for the application of the judicial estoppel doctrine. *See McCarron v. FDIC,* 111 F.3d 1089, 1097 (3d Cir.1997).

LAW OF THE CASE DOCTRINE

Pelullo contends that the prior decisions of the Third Circuit in this matter establish that the McKeen and Moran reports constitute *Brady* material, because the Third Circuit has previously held that surveillance information contained in the surveillance logs constituted *Brady* evidence. Pelullo also contends that the Third Circuit has rejected the government's argument that the fact that unidentified persons were observed at Scarfo's residence undermines any impeachment value of the McKeen and the Moran reports.

Under the law of the case doctrine, this Court is bound by the mandate of the Third Circuit. However, the law of the case doctrine applies only to matters actually decided by the prior decision. *See Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.,* 988 F.2d 414, 429-30

(3d Cir.1993). Following a remand for a new trial, the district court may address issues that were not decided by the Court of Appeals in its decision remanding the case. *See Cooper Distributing Company v. Amana Refrigeration, Inc.*, 180 F.3d 542, 548 (3d Cir.1999)(law of the case doctrine did not preclude district court from admitting evidence at retrial in support of plaintiff's damage theory which the appellate court did not address in its original opinion).

In this § 2255 petition, Pelullo contends that the McKeen report and the Moran report constitute *Brady* material that the government should have produced before the January 1995 trial. However, the Third Circuit has never addressed or decided whether the McKeen report or the Moran report should have been produced before the January 1995 trial. Nor has the Third Circuit addressed whether the suppression of these documents, assuming Pelullo could establish these documents were suppressed within the meaning of *Brady,* constituted a due process violation under *Brady.*

In *Pelullo III,* the Third Circuit considered whether the surveillance logs and two other pieces of evidence should have been produced to Pelullo before the commencement of the 1991 trial. In the context of that *Brady* analysis, none of the surveillance information had been produced to Pelullo before the 1991 trial. Also, the Third Circuit based its *Brady* analysis on the cumulative effect of the absence of the surveillance logs and the two other pieces of evidence. *See Kyles v. Whitley,* 514 U.S. 419, 436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Here, Pelullo contends that the McKeen report and the Moran report should have been produced for the January 1995 trial. The Court's analysis of this new *Brady* claim must take into account the fact that Pelullo had the surveillance logs, and the two other pieces of impeachment evidence, available for use during the January 1995 trial. In short, the Third Circuit's *Brady* analysis in *Pelullo III* did not address the same *Brady* issue presented in this § 2255 petition. Accordingly, *Pelullo III* does not preclude this Court from conducting an independent analysis of the McKeen report and the Moran report under *Brady* principles.

While the prior decisions of the Third Circuit do not preclude an independent analysis of Pelullo's *Brady* claim, the Third Circuit's most recent decision in this case does provide the Court with guidance in addressing the merits of Pelullo's claim. As the Supreme Court has stated, the failure of the government to produce evidence favorable to the defense does not constitute a *Brady* violation. *See Strickler v. Greene,* 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Rather, proof of a *Brady* violation requires a showing that the failure to produce the favorable evidence caused the defendant prejudice, meaning that the evidence was material to the defense:

[T]he term "*Brady* violation" is sometime used to refer to any breach of the broad obligation to disclose exculpatory evidence--that is, to any suppression of so-called "*Brady* material"--although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.
Id. at 281, 119 S.Ct. 1936.

In considering the prejudice element under *Brady,* the Court may consider: (a) the impeachment value of the suppressed evidence, *see Id.* at 291, 119 S.Ct. 1936; (b) whether the defendant had other impeachment evidence available to use at trial, *see Hollman v. Wilson,* 158 F.3d 177, 181-182 (3d Cir.1998); and (c) the weight of the government's evidence establishing the defendant's guilt. *See Strickler v. Greene,* 527 at 293, 119 S.Ct. 1936; *Hollman v. Wilson,* 158 F.3d at 182-83.

In *Pelullo III,* the Third Circuit affirmed this Court's conclusion that Pelullo would have testified in his own defense at the 1991 trial even if certain *Brady* evidence had been produced to him before trial. In its review of this Court's findings, the Third Circuit noted that this Court had "properly noted the questionable impeachment value of the surveillance logs." *United States v. Pelullo,* 173 F.3d 131, 142 (3d Cir.1999) (quoting *United States v. Pelullo,* 105 F.3d at 123 n. 3). The Third Circuit also affirmed this Court's factual finding that during the January 1995 trial, "Pelullo had a number of ways to impeach Leonetti's

testimony...." *Id.* at 144. Finally, the Third Circuit also affirmed this Court's factual finding that, during the January 1995 trial: "Pelullo had a significant amount of evidence that he could use in mounting a defense to Count 54." *Id. These factual findings, which the Third Circuit has affirmed, provide the background for the Court's analysis of whether the alleged suppression of the McKeen report or the Moran report renders the jury verdicts in the 1995 trial unworthy of confidence.*

Pelullo also contends that the Third Circuit's decision in Pelullo II precludes the Court from considering whether a *Brady* violation with respect to Count 55 based upon the McKeen report and the Moran report would have tainted the other counts of conviction. In *Pelullo II,* the Third Circuit considered whether the erroneous admission of Pelullo's conviction on Count 54 had a spillover effect on the other counts of conviction. In this petition, Pelullo contends that the failure to produce the McKeen report and the Moran report impaired his ability to impeach Leonetti with respect to RA 60. Again, the Third Circuit did not address this issue in *Pelullo II.* Therefore, the Court can conduct an independent analysis of whether any alleged *Brady* violation relating to the McKeen report and the Moran report tainted any other count of conviction.

SURVEILLANCE INFORMATION ABOUT SCARFO AT LOCATIONS OTHER THAN HIS FLORIDA RESIDENCE IS NOT MATERIAL UNDER BRADY.

In Pelullo's response to the government's proposed Findings of Fact, he points to two meetings described in the McKeen report, at which surveillance was conducted, which are not mentioned in the surveillance logs. (Defense Exhibit 1). These meetings have absolutely no relevance to the defense theory in this case and cannot be relevant *Brady* material. One meeting was between Scarfo and David Iacovetti on January 29, 1986 at Pumpernick's Restaurant in Hallendale, Florida; and the other meeting was between Scarfo and several associates on January 30, 1986 at the Pier 5 Restaurant in Hallendale, Florida.

This information is not relevant because the government never

contended that Pelullo met with Scarfo at either Pumpernick's Restaurant or the Pier 5 Restaurant.

REASONS FOR DENYING THE REQUEST FOR DISCOVERY

Earlier in this Memorandum, it was mentioned that the Court denied Pelullo's request for discovery filed August 11, 2000, shortly before the hearing scheduled on August 24, 2000. I denied this request because the hearing had already been delayed 32 months while we waited for Mr. Pelullo to be returned from the State of Florida. If, in fact, there had been a need for discovery, it could have been conducted during that period, but was never requested. No reason was ever given for the delay in making the request. There was never any credible showing that discovery would uncover any evidence to assist Pelullo in proving the allegations of his petition.

In addition, we have the added circumstance that Pelullo in the first trial took the witness stand and admitted being at the Scarfo house on the two occasions referred to in pages 9-11 of this Memorandum.

CONCLUSIONS OF LAW

Based on the foregoing, the Court makes the following Findings:

1. Pelullo has failed to establish that he did not possess the alleged *Brady* material during the 1995 trial.
2. The Court finds that even if Pelullo did not possess the alleged *Brady* material during the 1995 trial, Pelullo could have obtained the alleged *Brady* material for use at the 1995 trial through the exercise of due diligence.
3. The alleged *Brady* evidence was not material to Pelullo's defense.
4. Even assuming Pelullo did not have possession of the alleged *Brady* material, the absence of the McKeen report and the Moran report did not deprive Pelullo of a fair trial worthy of the Court's confidence.
5. Any prejudicial error with respect to Count 55 arising from the government's failure to produce the McKeen report or the Moran report to Pelullo before the 1995 trial did not taint the other wire fraud counts for which Pelullo was convicted.
6. Pelullo has failed to establish any grounds for additional discovery or for an additional continuance of the evidentiary hearing.
7. Pelullo has failed to make a substantial showing of a denial of a constitutional right. Accordingly, a Certificate of Appealability shall not

issue.
We, therefore, enter the following Order.

ORDER

AND NOW, this 24th day of APRIL, 2001, it is hereby ORDERED that Leonard A. Pelullo's Motion to Set Aside Convictions is DENIED with prejudice. Because Leonard A. Pelullo has not made a substantial showing of denial of a constitutional right, a Certificate of Appealability is not issued.

UNITED STATES OF AMERICA
v.
LEONARD A. PELULLO

Nos. 95-1829, 95-1856
United States Court of Appeals
for the Third Circuit
January 9, 1997

I.

This appeal represents the third time this case has come before our court. On both previous occasions we reversed Pelullo's convictions. See *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992) ("*Pelullo I*") (reversing all but one of Pelullo's fraud convictions due to the erroneous admission of unauthenticated bank records); *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994) ("*Pelullo II*") (reversing all of Pelullo's convictions on the ground that it was error to invoke the doctrine of collateral estoppel with regard to the single wire fraud conviction upheld in *Pelullo I*).

The procedural history of this case, particularly as it involves Pelullo's first trial, helps place in context the issues raised in this appeal, and we begin with a discussion of that trial.

A.

When Pelullo was first indicted, he was the Chief Executive Officer of The Royale Group, Limited ("Royale"), a publicly held corporation. The indictment alleged that as its CEO, Pelullo had engaged in a series of illegal schemes to defraud Royale. Paramount among these for our purposes was Count 54 of the indictment, which charged Pelullo with wire fraud. Specifically, Count 54 alleged that in early 1986, Pelullo diverted $ 114,000 from a Royale subsidiary to pay-off part of a $ 250,000 personal loan owed to Anthony DiSalvo, a loanshark purported to have ties to the Philadelphia mafia. The indictment also alleged that Count 54 constituted a predicate act, Racketeering Act 60, for a separate RICO count.

The government's case against Pelullo on Count 54 was based primarily upon the testimony of two government agents, FBI Agent Randal Wolverton and IRS Agent James Kurtz; and an admitted mafia underboss, Philip Leonetti. In particular, Wolverton testified that Pelullo had admitted in an interview with FBI agents to using the $ 114,000 to pay-off DiSalvo. In addition, there was testimony establishing that after Pelullo initially failed to repay the $ 250,000 loan, DiSalvo sought the assistance of Leonetti in an attempt to collect the outstanding debt. In fact, Leonetti testified that he met with Pelullo in January 1986 at the Florida home of Nicodemo Scarfo, the reputed boss of the Philadelphia Mafia, to inform Pelullo that he had to repay DiSalvo. In late February of 1986, Pelullo wired $ 114,000 from a business bank account to a family corporation in Philadelphia. The transferred money was allegedly converted to cash by Arthur Pelullo, Leonard Pelullo's brother, and given to Peter Pelullo, Leonard Pelullo's other brother, to drop-off at DiSalvo's home in Philadelphia.

In response to the government's case, Pelullo took the stand in his own defense and, among other things, contradicted Wolverton's claim that he had admitted to using Royale funds to repay his personal debt to DiSalvo. Instead, he testified that the loan had not been paid-off until the Summer of 1986 and that the $ 114,000 in question had been used to repay an intercompany debt earlier that same year. See Appellant's Br. at 10. The jury, apparently unpersuaded by Pelullo's testimony on this and other matters, returned a guilty verdict on all counts of the

indictment. As noted earlier, however, on appeal we reversed all of Pelullo's convictions from his first trial, except for his conviction of wire fraud on Count 54.

Sometime after Pelullo's first appeal, but before his retrial, the defense obtained potential impeachment evidence from the government that the government had withheld despite Pelullo's repeated production requests. The withheld evidence consisted of an IRS memorandum, which detailed Leonetti's interview with IRS Agent Kurtz. The memorandum contained references to meeting dates between Pelullo and Leonetti that directly contradicted Leonetti's testimony at trial.

On retrial, Pelullo was again found guilty on all counts. Thereafter, he filed a Rule 33 motion for a new trial on Count 54 based on the fact that during the first trial the government had withheld potential impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), which creates a duty on the part of the government to provide the defense with potentially exculpatory or impeachment evidence. *See also United States v. Bagley*, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985) (noting that impeachment evidence falls within the Brady rule). The district court denied Pelullo's Rule 33 motion, and Pelullo appealed that ruling as well as his convictions from the second trial.

On the second appeal, we affirmed Pelullo's conviction on Count 54 on the grounds that the withheld IRS memorandum did not lead to a "reasonable probability" that the outcome of the first trial would have been different had the government turned the memorandum over prior to the first trial. See *Pelullo II*, 14 F.3d at 887. We reversed Pelullo's convictions, however, on all other counts. Specifically, we held that the district court erred in according Pelullo's prior conviction on Count 54 preclusive effect in Pelullo's second trial. *Id.* at 897.

At some point following Pelullo's second trial, but before the beginning of his third trial (which ended in a hung jury), the government turned over to the defense three more pieces of potential impeachment evidence, which Pelullo's counsel had repeatedly requested since the first trial. Pelullo contends that each of the three items undermined the

testimony of the government agents and Leonetti and supported his claim that in early 1986, he had used the $ 114,000 to pay-off an intercompany debt. This evidence consisted of: (1) rough notes of FBI Agent Wolverton taken during an interview with Pelullo, which included the notation "repaying intercompany debt," a statement that had not appeared in the FBI 302 report; (2) rough notes of IRS Agent Kurtz taken during an interview with Leonetti, which referenced a date, "Summer 1986," which was not included in Kurtz's final memorandum; and (3) a series of FBI surveillance tapes of Nicodemo Scarfo's Florida home from January 1986, which do not list Pelullo as a visitor to the residence.

Prior to the fourth trial, Pelullo filed a motion pursuant to 28 U.S.C. § 2255 to reverse his conviction on Count 54 and to dismiss the indictment due to the government's alleged Brady violations. The district court did not rule on that motion until after the conclusion of the fourth trial. In a post-trial ruling, the district court denied Pelullo's §§ 2255 motion on the ground that the government had not violated its Brady obligations. *See United States v. Pelullo*, 895 F. Supp. 718, 738 (E.D. Pa. 1995) ("*Pelullo III*").

Obviously this protracted litigation, with its wide audience (four juries and two prior appellate panels), has given rise to more than we have set forth above in terms of procedural and factual matters. But our purpose here is to focus upon what we believe to be particularly relevant to what occurred in Pelullo's fourth and most recent trial.

B.

At the fourth trial, Pelullo was convicted of 46 counts of wire fraud and one RICO count, Racketeering Act 60. The substance of the government's case against Pelullo during the fourth trial, including the allegations contained in the Racketeering Act 60 charge in particular, was largely indistinguishable from that of his three earlier trials. In fact, the only noteworthy difference was that at the conclusion of its case-in-chief in the fourth trial, the government introduced portions of Pelullo's testimony from his first trial. With respect to Racketeering Act 60, the government admitted the following testimony from the first trial:

Q: First of all, did you ever have any contact with Mr. Leonetti?

A: I have knowledge of who Mr. Leonetti is. I grew up in South Philadelphia. I know these people from seeing them on the street and maybe running into them at a restaurant. Do I know them well. Do I associate with them? No.

* * *

Q: Do you know a man named Nicodemo Scarfo?

A: I know who he is. I know him from South Philadelphia. I could have run into him at a restaurant. I know who he is.

* * *

Q: Okay. Have you ever been to his home?

A: Yes.

Q: How did that come about?

A: What happened was I was in Miami and a man called me by the name of Sam LaRusso. Sam had worked for my father about 30 years ago as a laborer. And he told me he had a job in Fort Lauderdale, would I come up and help him? I said sure, Sam, I'll be up to see it.

I went up to Fort Lauderdale and when I get there he tells me where I'm at. I didn't know it was Scarfo's house. And he said Leonard, he said, I need some help here. There's a construction job. I don't have any people here and I need to get a permit. I said, Sam, I don't want to get involved. Don't put me in this position.

And I wasn't threatened, but the situation with Sam was that Sam was a prisoner, basically, until this work was done and he asked me to get him a permit, get him some contractors to get the work done, otherwise he was going to have problem with these people. And I looked at the

job. I sent Kent Swenson there and I said see what you can do about getting him a permit and get him some plans and get the job done and let's get the hell out of here. That's what I told him.

Q: Is that the only time you were ever at his house?

A: I might have been there twice with Sam, because he needed some technical help on how to do something and I tried to limit my exposure there, yes.

See Government's Motion for the Admission of Leonard A. Pelullo's Prior Statements, Supp. App. at 1450-52.

This, in essence, was the nature of the government's case against Pelullo in his fourth trial, and with this in mind we will address the issues he raises in this appeal.

II.

Although Pelullo raises a series of claims on appeal,[1] we will focus

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[1] In addition to the four issues discussed in detail in Part II of our opinion, Pelullo also raises the following four claims: (1) that the district court committed two evidentiary errors by admitting alleged hearsay testimony and excluding the testimony of Peter Pelullo, Sr.; (2) that the prosecutor's rebuttal summation constituted plain error, denying Pelullo a fair trial; (3) that the fine imposed by the district court was plain error; and (4) that the district court improperly ordered the forfeiture of Pelullo's Montana ranch.

First, we do not believe that the district court abused its discretion in admitting certain testimony or in limiting the scope of Peter Pelullo, Sr.'s testimony. Second, in our view, the prosecutor's statements with respect to whether certain government witnesses would lie, although troublesome, did not rise to the level of plain error. Third, we believe the court acted in accordance with 18 U.S.C. § 1963(a), which provides that "a defendant who derives profits or other proceeds from an offense may be fined not more that twice the gross profits or other proceeds," when it imposed a $ 3.48 million fine. *See* Supp. App. at 1365 ("We [the defense] have indicated and the Government agrees, that the jury convicted of a fraud involving $ 1.74 million . . . . "). Fourth, because the Montana ranch fell within the scope of Pelullo's property identified in the indictment, the district court's forfeiture ruling was consistent with the requirements of Rule 7(c)(2) of the Federal Rules of Criminal Procedure.

upon the following four:

(1) that due to the government's Brady violation he is entitled to collateral relief on his Count 54 conviction from his first trial;

(2) that he was forced to take the stand at his first trial because of the government's Brady violation and, therefore, the government's reliance in this case upon the testimony from that trial requires a reversal of his convictions;

(3) that his right to a fair and impartial jury was violated because of a juror's failure honestly to answer certain questions during voir dire;

(4) that the district court improperly increased Pelullo's sentence following his conviction at the fourth trial.

A.

Pelullo claims that the district court erred under 28 U.S.C. § 2255 when it denied his claim for collateral relief from his conviction at his first trial on Count 54.[2] More specifically, he argues that this guilty verdict should be set aside because of the government's alleged Brady violation -- its failure to turn over prior to his first trial the three pieces of impeachment evidence discussed earlier. *See United States v. Biberfeld*, 957 F.2d 98, 103 (3d Cir. 1992) (recognizing that Brady violations fall within the scope of 28 U.S.C. § 2255); *see also Lesko v. Owens*, 881 F.2d 44, 50 (3d Cir. 1990) ("Whether an error reaches the magnitude of a constitutional violation is an issue of law, subject to plenary review."), *cert. denied*, 493 U.S. 1036, 107 L. Ed. 2d 775, 110 S. Ct. 759 (1990). Pelullo contends that the government's suppression of this information

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[2] Section 2255 states in relevant part that:

> [a] prisoner . . . under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . .

rendered the guilty verdict in his first trial on Count 54 unworthy of confidence. *See Kyles v. Whitley*, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555, 1566 (1995) ("The question [under Brady] is not whether the defendant would more likely than not have received a different verdict with the [suppressed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

In deciding whether Pelullo is entitled to collateral relief from this conviction, we must consider the following two questions: first, did the government fail to provide the defense with potential impeachment evidence, specifically, the rough notes of Agents Wolverton and Kurtz, as well as various FBI surveillance tapes?; and second, if so, did the suppression of the evidence create a reasonable probability that a different result would have occurred at Pelullo's first trial on Count 54 had it been provided to the defense, thus rendering the violation a material one? *See Brady*, 373 U.S. at 87 ("The suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also United States v. Bagley*, 473 U.S. 667, 678, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985) (noting that "suppression of [Brady] evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial"); *Kyles*, 115 S. Ct. at 1566 (defining a "fair trial" as one in which the verdict is worthy of confidence).

1.

We have no hesitation in concluding that the government inexplicably failed to abide by its obligation under Brady to disclose potential impeachment evidence. *See, e.g., United States v. Ramos*, 27 F.3d 65 (3d Cir. 1994) (recognizing that rough notes often may constitute valuable Brady material); *United States v. Alvarez*, 86 F.3d 901 (9th Cir. 1996) (same). As noted earlier, Pelullo argues that the withheld evidence clearly could have been utilized by the defense during his first trial to undermine the government's case on Count 54 by way of impeaching the testimony of three government witness: Leonetti, Wolverton and Kurtz. We agree. *See Bagley*, 473 U.S. at 676

("Impeachment evidence . . . as well as exculpatory evidence, falls within the Brady rule."). For example, the defense could have seized upon the notation "repaying an intercompany debt," which appeared in Wolverton's rough notes but not in his final FBI 302, to question the credibility of Wolverton's testimony that Pelullo admitted in his interview that he had used $ 114,000 to pay-off a debt owed to DiSalvo. Similarly, the reference to "Summer 1986" in Agent Kurtz's rough notes of his interview with Leonetti, which was not included in his report, arguably supported Pelullo's claim that the loan to DiSalvo was not paid-off until August or September of 1986, instead of February 1986 as the Government contended at trial. Finally, in theory, the FBI's surveillance tapes, which do not include any mention of Pelullo, could have undermined the credibility of Leonetti's claim that he met with Pelullo at Scarfo's Florida home sometime in January 1986 to discuss repayment of the DiSalvo loan.[3] Clearly, therefore, whether considered separately or collectively, these three items had potential impeachment value to the defense and, thus, constituted Brady evidence. As such, the government had an affirmative duty, which in this case it ignored, to provide this information to the defense.

2.

The question whether the nondisclosure of potential impeachment evidence was "material," however, requires a very different and more in-depth analysis. *See Bagley*, 473 U.S. at 682 ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."). The Supreme Court has cautioned that in making a Brady materiality determination, the focus should be upon an evaluation of whether the suppression of the evidence, when viewed collectively,

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[3] In reality, the impeachment value of the FBI surveillance reports of Scarfo's home was questionable, because "no surveillance was conducted January 1, 3, and 5-21." *Pelullo III*, 895 F. Supp. at 738. In other words, the tapes only covered twelve days during the month of January, 1986. As such, they would likely do little, if any, to undermine Leonetti's testimony that he met with Pelullo at Scarfo's residence during that month to discuss repayment of the DiSalvo loan.

resulted in a verdict unworthy of confidence. *See Kyles*, 115 S. Ct. at 1567 (noting that the materiality of "suppressed evidence [is to be] considered collectively, not item-by-item"). Essentially, therefore, the question we must resolve is: when viewed as a whole and in light of the substance of the prosecution's case, did the government's failure to provide three pieces of Brady impeachment evidence to the defense prior to the first trial lead to an untrustworthy guilty verdict in that case on Count 54?

3.

We do not question that Pelullo's defense to Count 54 during his first trial would have been more compelling had it included the items of impeachment evidence at issue. Pelullo's defense to Count 54 was that he had used the money transferred in February to pay-off an intercompany debt and that he had not payed-off the DiSalvo loan until August or September. Pelullo's defense was contradicted at trial only by the testimony of three pivotal government witnesses: IRS Agent Kurtz, FBI Agent Wolverton and reputed mob underboss Leonetti. Indeed, this testimony was the linchpin of the government's case against Pelullo on that count.

As noted earlier, each piece of withheld evidence could have been used by the defense to undermine the credibility of Wolverton's, Kurtz's and Leonetti's testimony and formal reports. Because the credibility of the government witnesses was so central to the government's case, the jury very well could have reached a different verdict had Pelullo been armed with this impeachment evidence.

Moreover, the result of Pelullo's third trial indicates that the result of his first trial may have been different had the evidence been turned over. At the third trial, when the evidence had finally been turned over to the defense, the jury failed to convict Pelullo on Racketeering Act 60, which charged the identical conduct as Count 54. Of course, we cannot know for certain why a jury would be unable to reach a verdict, but at the very least, the result of the third trial suggests that some members of

the jury may have been swayed by the impeachment evidence.[4] As such, we cannot say that the guilty verdict on Count 54 in the first trial is worthy of confidence. *See Bagley*, 473 U.S. at 678 (holding that a conviction must be reversed "if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial") (citation omitted). Accordingly, because we find that the withheld evidence was both favorable to the defense and material, we reverse the district court's denial of Pelullo's motion for collateral relief under 28 U.S.C. § 2255 and remand for a new trial on Count 54.

B.

Pelullo also claims that the district court erred by allowing the government to introduce his testimony from the first trial during its case-in-chief in the fourth trial. According to Pelullo, this testimony should not have been allowed because he was forced to take the stand at the first trial due solely to the government's failure to abide by its obligation under Brady. In other words, Pelullo argues that because he had no other way to impeach the government witness, he was compelled to take the stand himself and rebut their testimony. Thus, he contends that all of his convictions at his fourth trial were tainted and, therefore, should be reversed.

In support of his argument, Pelullo relies primarily upon *Harrison v. United States*, 392 U.S. 219, 20 L. Ed. 2d 1047, 88 S. Ct. 2008 (1968). There, the Supreme Court held that a defendant's testimony, given after

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[4] The government contends that because Pelullo had the alleged Brady material before the fourth trial and was nevertheless convicted of Racketeering Act 60, the withheld evidence would not have made a difference in the first trial. As discussed earlier, however, the defendant does not have to prove that he would not have been convicted had the government complied with its Brady obligations. Rather, it is enough that confidence in the verdict is undermined. *See Kyles*, 115 S. Ct. at 1566. While we do not find the results of either the third or the fourth trial to be dispositive on the issue of materiality, the jury's failure to reach a verdict in the third trial bolsters our conclusion that the verdict in the first trial is untrustworthy. Moreover, the conviction in the fourth trial does little to instill confidence in the Count 54 conviction because in that trial the government introduced Pelullo's testimony from the first trial, which it had not done in the third trial.

the government had introduced what was later determined to have constituted a series of illegally obtained confessions, could not be used against that same defendant in a subsequent proceeding. Because Pelullo cites Harrison as the chief source of support for his position, we will begin our discussion with an analysis of that case.

Harrison had been charged with felony murder and at trial took the stand in his own defense. In the wake of his testimony, which was at variance with three confessions that previously had been introduced by the government during its case-in-chief, the jury returned a guilty verdict.[5] On appeal, the D.C. Circuit reversed Harrison's conviction and remanded the case for a new trial on the ground that the three confessions had been illegally obtained, a clear violation of his Fifth Amendment right against self-incrimination, and were therefore inadmissible. During the second trial, however, the prosecution was allowed to introduce the substance of Harrison's testimony from his first trial. Once again, the jury returned a guilty verdict.

In reversing Harrison's conviction, the Supreme Court held that his testimony at his original trial was the "inadmissible fruit of the illegally procured confessions" and, thus, should not have been presented to the jury during his second trial. *See Harrison*, 392 U.S. at 223 (noting that because Harrison apparently took the stand "to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible"). According to Pelullo, his

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[5] In contrasting the substance of the three confessions and Harrison's own testimony, the Supreme Court stated :

> The substance of the confessions was that the petitioner and two others, armed with a shotgun, had gone to the victim's house intending to rob him, and that the victim had been killed while resisting their entry into his home. In his testimony at trial the petitioner said that he and his companions had gone to the victim's home hoping to pawn the shotgun, and that the victim was accidently killed while the petitioner was presenting the gun to him for inspection.

Harrison, 392 U.S. at 221.

decision to take the stand at his first trial was impelled by the government's unlawful withholding of vital impeachment evidence. In other words, Pelullo claims that his testimony at his first trial, like Harrison's, constitutes the inadmissible fruit of a poisonous tree.

As a general rule, a defendant's testimony at a former trial is admissible in subsequent trials. *See Harrison*, 392 U.S. at 322. When a defendant's testimony is compelled, however, by a constitutional violation, that testimony must be excluded from subsequent proceedings.[6] Thus, a court must determine: (1) whether there was a constitutional violation; and (2) whether the defendant would have testified anyway even if there had been no constitutional violation. The burden of proving that the defendant would have testified had the government not committed the violation lies with the government. *See id.* at 225 ("Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony.") (citation omitted).

We have already determined that the government violated Pelullo's right to a fair trial on Count 54 by withholding Brady material prior to the first trial. Thus, the first prong of the *Harrison* analysis has been satisfied. We decline to determine, however, whether Pelullo would have testified in the first trial anyway even if the government had

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[6] Seventeen years after *Harrison*, in *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222, 105 S. Ct. 1285 (1985), the Supreme Court held that only coerced confessions violate the Fifth Amendment. Today, it is unclear whether the government's reliance upon Harrison's illegally obtained (but not coerced) confessions would rise to the level of a constitutional violation. See Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 998 (1995) (noting that "considering the case's particular facts, it must be said that Harrison would probably be decided differently today . . . [because] the poisonous tree in Harrison consisted on merely McNabb-Mallory violations, not coerced confessions, and in Elstad the Court indicated that nowadays the poisonous tree doctrine only applies to evidence stemming from constitutional violations").

In any event, regardless of whether Elstad can be read to modify Harrison to apply only to evidence stemming from constitutional violations, we see no reason to limit the application of Harrison in this case. Here, the government's failure to abide by its Brady obligations resulted in a constitutional violation.

complied with its Brady obligations. Instead, for the reasons that follow, we will remand to the district court to make this determination.

1.

Generally, we will review a district court's evidentiary rulings for abuse of discretion. *See United States v. Himelwright*, 42 F.3d 777, 781 (3d Cir. 1994) (*citing United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992). When, however, a district court's ruling is based on an interpretation of law, our review is plenary. *See United States v. Sokolow*, 91 F.3d 396, 402 (3d Cir. 1996).

At the conclusion of Pelullo's fourth trial, the district court held an evidentiary hearing to determine whether Pelullo's testimony from the first trial had been improperly admitted. *See Pelullo III*, 895 F. Supp. 718 (E.D. Pa. 1995). The district court rejected Pelullo's contention that his decision to testify at the first trial was impelled by the government's Brady violation. *See id.* at 740. There are two problems with the district court's conclusion. First, the district court's conclusion was driven largely by its determination that the evidence did not constitute Brady material. *See id.* Under the district court's analysis, because there was no Brady violation, Pelullo's testimony could not logically be said to have been "impelled" by that Brady violation. Although not explicitly stated, the district court seems to have concluded that because the withheld evidence was insubstantial -- that its suppression did not affect the fairness of the Count 54 verdict -- by the same token, the evidence could not have been so fundamental to Pelullo's case that he would not have testified had the evidence been properly turned over. However, we have reversed the district court's holding on the Brady issue. It follows that we cannot defer to the district court's holding on the Harrison issue.

Second, the district court concluded that Pelullo would have taken the stand even if the withheld evidence was material and had been provided to the defense prior to the first trial. *See id.* In reaching this conclusion, however, the district court misallocated the burden under Harrison. Harrison makes clear that the burden of proof lies with the government to show that the defendant would have testified anyway absent the constitutional violation. *See Harrison*, 392 U.S. at 225. In rejecting

Pelullo's argument for a new trial, the district court stated that "Defendant offers no explanation as to why he would not have testified had he been in possession of these materials." *Pelullo III*, 895 F. Supp. at 740. By imposing the burden on Pelullo, the district court committed error.

Accordingly, because the district court's conclusion on the *Harrison* issue was based on its finding that no *Brady* violation had been committed, and because the district court misallocated the burden of proof under *Harrison*, we vacate the district court's denial of Pelullo's Rule 33 motion for a new trial and remand for a new hearing on that motion consistent with this opinion. On remand, the government should be afforded an opportunity to demonstrate, consistent with its burden of proof, that Pelullo would have testified during his first trial even if the withheld material had been turned over.

C.

Next, Pelullo claims that he is entitled to a new trial due to the misconduct of one of the jurors during his fourth trial. According to Pelullo, after his conviction he became aware that Juror # 229 had not honestly answered a series of questions during voir dire. Pelullo alleged that this juror failed truthfully to respond to the following questions:

(1) Is any juror related to or closely associated with anyone employed by any law enforcement agency, including the FBI, local police?

(2) Has any juror ever been related to or associated or connected with anyone who was involved in the defense of a criminal case? Whether as a witness, party or as an attorney who defended the matter?

(3) Has any juror, relative or close friend ever been charged with a crime in any court, state, local or federal?

See Appellant's Br. at 30. As a result, Pelullo filed a motion under Fed.

R. Crim. Proc. 33, seeking a new trial.[7] Due to the vague and generally conclusive nature of the motion, the district court decided to hold a hearing to determine whether this alleged misconduct was discovered during or after the trial.

In general, once a verdict has been reached courts are reluctant to recall jurors to determine whether misconduct has occurred. *See United States v. Gilsenan*, 949 F.2d 90, 97 (3d Cir. 1991). Thus, to prevail on a Rule 33 motion based upon juror misconduct, a defendant must establish as a preliminary matter that: "(1) the evidence is newly discovered, in other words, that it has been discovered since the end of the trial and (2) that the defendant's failure to discover this information during trial is not the result of a lack of diligence." *United States v. Bolinger*, 837 F.2d 436, 438-39 (11th Cir. 1989); see also *United States v. McKinney*, 952 F.2d 333 (9th Cir. 1991) ("[A] defendant cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct.").

During the course of the evidentiary hearing, which lasted three days, the trial court heard testimony from a variety of witnesses, including a Ms. Mitchell, the individual who allegedly initially learned of the misconduct of Juror # 229. At the time of the hearings, Ms. Mitchell had been employed by Pelullo's father for more than a year at his wholesale food store, Montco Cash and Carry. In commenting upon Ms. Mitchell's testimony, the court observed that:

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[7] Rule 33 of the Federal Rules of Criminal Procedure provides that:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

> despite the new found information that the Juror had a sister who was the victim of a violent crime, smoked marijuana every day prior to trial and had a brother-in-law who was convicted of a crime, Ms. Mitchell did not disclose this information to Defendant's father. Ms. Mitchell is not sure whether she ever disclosed this information to Defendant's father. In fact, Ms. Mitchell is not very sure when or to whom she disclosed this information about the Juror. All Ms. Mitchell remembers is that she revealed this information to Neil Eggleston, one of Defendant's attorneys, sometime between mid-February and mid-March. Ms Mitchell claims that she found Mr. Eggleston's name in the Rolodex at work and decided to call him without being instructed to do so by anyone.

Pelullo III, 895 F. Supp. at 725 (citations omitted). The district court ultimately rejected as incredible the testimony of Ms. Mitchell, choosing instead to credit the testimony of James Grimes, James Donahue and John Micofsky. See *id.* at 727-30. Relying largely upon the statements of Messrs. Grimes, Donahue and Micofsky, the court concluded that there was sufficient evidence from which to infer that Pelullo or, perhaps, his counsel had knowledge of the juror's alleged misconduct prior to the end of the trial. *See id.* at 729-31. Accordingly, the court denied Pelullo's Rule 33 motion for a new trial. *Id.* at 730.

In our view, there was adequate factual evidence presented during the hearing to support the district court's finding.[8] *See Anderson v. Bessemer City*, 470 U.S. 564, 575, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (noting that "when a trial judge's finding is based on his decision to credit the testimony of one or two witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error"). As such, we will affirm the district court's denial of Pelullo's Rule 33 motion for a new trial based on juror misconduct.

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[8] An in-depth discussion of the substance of the three day hearing is set forth in the district court's opinion. *Pelullo III*, 895 F. Supp. at 723-30.

D.

Finally, Pelullo contends the district court erred by imposing a sentence for his conviction on Count 54 that was longer than the sentence he had received earlier for the same count. Because we will reverse Pelullo's conviction on Count 54, we need not address Pelullo's sentencing argument.

For the foregoing reasons, we will reverse the district court's order on the § 2255 motion and remand for a new trial on Count 54. We will also reverse the district court's order on the Rule 33 motion and remand for a new hearing. We will affirm the district court's order in all other respects.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

1. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right. . .to be informed of the nature and cause of the accusation [and] to have the Assistance of Counsel for his defence.

18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

Federal Rule of Appellate Procedure 1(a)(1) provides:

> These rules govern procedure in the United States courts of appeals.

Federal Rule of Appellate Procedure 22 provides in pertinent part:

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

Federal Rule of Appellate Procedure 47(a)(1) provides:

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

Third Circuit Local Appellate Rule 22.2 provides:

At the time a final order denying a petition under 28 U.S.C. § 2254 or § 2255 is issued, the district judge shall make a determination as to whether a certificate of appealability should issue. . .If an order denying a petition under §2254 or §2255 is accompanied by an opinion or a magistrate judge's report, it is sufficient if the order denying the certificate references the opinion or report.

(2)

Supreme Court, U.S.
FILED
MAR 18 2003

NO. 02-1207

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

LEONARD A. PELULLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. Pursuant to *Miller-El v. Cockrell*, – U.S. – (No. 01-7662, 2/25/03), a decision entered two weeks after Petitioner's certiorari petition was filed, this Court should remand this case to the United States Court of Appeals for the Third Circuit for further proceedings.

Petitioner's certiorari petition was filed on February 10, 2003 and is scheduled for conference on Friday, March 21, 2003. Petitioner contended that the procedure used to deny his petition for certificate of appealability ("COA") violated the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and F.R.App.P. 22(b)(1), since the district court denied a COA without explanation, App. 17a-18a, and the Third Circuit denied a COA on the ground that he could not obtain relief on the merits.

This Court's decision in *Miller-El*, issued three weeks after Petitioner filed his certiorari petition, squarely applies to Petitioner's case. *Miller-El* requires lower courts to assess whether a COA petition presents claims of *debatable* merit. *Id.*, slip op. at 10. Lower courts are expressly forbidden at the COA stage to decide whether the petitioner can prevail on the merits of his appeal. *Id.* Here, however, the lower courts decided Petitioner could not prevail in his appeal, a determination they "lack jurisdiction" to make at the COA level. *Id.*

For this reason, this Court should vacate the Third Circuit's order denying Petitioner a COA and remand for further proceedings consistent with *Miller-El*.

A. Summary of *Miller-El*

In *Miller-El*, the Fifth Circuit affirmed the district court's denial of the petitioner's COA on the ground that "there was insufficient merit to the case." *Id.*, slip op. at 4. This Court reversed and remanded for further proceedings, finding that the Fifth Circuit applied an incorrect standard of review:

> Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court need not make a definitive inquiry into this matter. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. *Slack [v. McDaniel]*, 529 U. S. [473], 481 [(2000)]; *Hohn [v. United States]*, 524 U. S. [236], 241 [(1998)]. The Court of Appeals should have inquired whether a 'substantial showing of the denial of a constitutional right' had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

Id. at 13.

The Court observed that issuance of a COA is a "jurisdictional prerequisite" to appeal, "because the COA statute mandates that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. . . ." *Id.* at 10 (*citing* 28 U.S.C. § 2253(c)(1)). Consequently, "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.* (emphasis added).

The Court defined the appropriate standard of review for COA petitions as follows:

> The COA determination under §2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. *We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.* This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then

> justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner '"has already failed in that endeavor."' *Barefoot [v. Estelle],* [463 U.S. 880,] 893, n. 4 [(1983)].

Id. (emphasis added).

B. Application of *Miller-El* To This Case

Here, the court of appeals did exactly what *Miller-El* prohibits. The court denied Petitioner a COA because it believed Petitioner would not prevail on the merits. App. 1a ("Specifically, appellant has failed to show that there is a reasonable probability that, had the McKeen report and Moran report been disclosed to the defense during the 1995 trial, the result of the proceeding would have been different"). *Miller-El* expressly states that the court of appeals lacks jurisdiction to decide the merits of an appeal at the COA stage. *Miller-El* at 10.

At the COA stage, the court of appeals must limit its inquiry to whether the "district court's application of AEDPA to petitioner's constitutional claims" is "debatable amongst jurists of reason." *Id.* Here, the court of appeals failed to examine whether Petitioner's arguments were debatable, instead engaging in improper merits review.

Not only did the Third Circuit violate *Miller-El*, but the district court did so as well. *Miller-El* requires the court of appeals to "look to the District Court's application of AEDPA to petitioner's constitutional

claims." *Id.* (emphasis added). The district court, however, provided *absolutely no explanation* of its application of AEDPA to Petitioner's claims, or indeed whether it applied the AEDPA at all. It is obvious that the district court committed the same error as the Third Circuit, namely it denied a COA because it believed Petitioner would not prevail on the merits in his appeal.

Absent any AEDPA analysis by the district court, the court of appeals was prevented from determining whether the "district court's application of AEDPA to petitioner's constitutional claims" was "debatable amongst jurists of reason." *Id.* To remedy this error, this Court should remand the instant case to the Third Circuit, which in turn should instruct the district court to examine Petitioner's claims under *Miller-El*'s strictures.

For these reasons, and for the reasons provided in Petitioner's certiorari petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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DATE: March 14, 2003